IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 515

IN THE MATTER

of

LYTTLETON B. P. GOULD, Bankrupt, JOSEPH K. SHERMAN, TRUSTEE IN BANKRUPTCY of LYTTLETON B. P. GOULD, Bankrupt,

Petitioner,

against

BUCKLEY & BUCKLEY, WILLIAM E. BUCKLEY and DAVID A. BUCKLEY, JR.,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

BUCKLEY & BUCKLEY,
Respondents *pro se.*

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SUBJECT INDEX.

	PAGE
OPINIONS OF THE COURTS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2, 3
STATEMENT OF THE CASE	3-6
ARGUMENT	6-21
I.—There is no conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. (2d) 428	7-9
II.—The Circuit Court of Appeals for the Second Circuit in the instant case has not decided a question of local law in conflict with New York decisions	9-11
III.—The New York Supreme Court had jurisdiction to fix the amount of the attorney's lien of Buckley & Buckley and is the proper court to enforce that lien	11-20
A—The New York Supreme Court had jurisdiction to fix the attorney's lien of Buckley & Buckley	12-15
B—The New York Supreme Court is the proper court to enforce the lien	15-18
C—The Decisions of the Supreme Court in *Isaacs* v. *Hobbs Tie & Lumber Co.*, *Taylor* v. *Sternberg* and *Gross* v. *Irving Trust Co.*, are not in conflict with the Decision of the Circuit Court of Appeals in the instant case	18-20
IV.—This case does not present a novel question	20-21
CONCLUSION	22
APPENDIX	23

Table of Cases.

	PAGE
In re Adamo, 151 Fed. 716	21
In re American Fidelity Corp., Ltd., 28 F. Supp. 462	11, 15, 17
Arkansas Corporation Commission v. *Thompson*, ... U. S. ....., 85 L. Ed. 801	18
In re Baxter & Co., 154 Fed. 22	13, 16
Bernstein v. *Bedrick*, 262 N. Y. 472, 188 N. E. 25	10, 16
Brown Shoe Co. v. *Wynne*, 281 Fed. 807	9
Connell v. *Walker*, 291 U. S. 1	12, 17
Corner v. *The John Hancock Life Ins. Co.*, 80 F. (2d) 413	15
Davis v. *Wakelee*, 156 U. S. 680	16
In re Devereaux, 76 F. (2d) 522	15
Eyster v. *Gaff*, 91 U. S. 521	12
Fischer v. *Pauline Oil & Gas Co.*, 309 U. S. 294	17
Gross v. *Irving Trust Company*, 289 U. S. 342	19
Hartman v. *Swiger*, 215 Fed. 986	16
Hausvater v. *Wikler & Diamont, Inc.*, 154 Misc. 555, 277 N. Y. Supp. 810	11
Hobbs v. *Head and Dowst Co.*, 231 U. S. 692	11, 17
Hofman v. *New York & Queens Electric Light & Power Co.*, 247 App. Div. 819, 286 N. Y. Supp. 685, modified 247 App. Div. 890, 288 N. Y. Supp. 768	10
Hunt v. *New York Cotton Exchange*, 205 U. S. 322	13
Isaacs v. *Hobbs Tie & Lumber Co.*, 282 U. S. 734	18
Kane v. *Rose*, 87 App. Div. 101, 84 N. Y. Supp. 111, aff'd 177 N. Y. 557, 69 N. E. 1125	10, 14
Lawbaugh v. *Sweeney*, 237 App. Div. 788, 262 N. Y. Supp. 830, appeal dismissed 262 N. Y. 528, 188 N. E. 50	10

PAGE

Matter of Tillman, 259 N. Y. 133, 181 N. E. 75 11
McDaniel National Bank v. *Bridwell*, 65 F. (2d) 428 7, 8
McHenry v. *La Societe Francaise*, 95 U. S. 58 15
McNally v. *Youngs*, 237 App. Div. 787, 262 N. Y. Supp. 828, appeal dismissed 262 N. Y. 526, 188 N. E. 49 10
Metcalf v. *Barker*, 187 U. S. 165 13
Oishei v. *Pennsylvania R. R. Co.*, 117 App. Div. 110 .. 16
Palmer v. *Texas*, 212 U. S. 118 13
Peck v. *Jenness*, 7 How. 612 13
In re Pennell, 159 Fed. 500 16
Pickens v. *Roy*, 187 U. S. 177 13
In re Prudence Co., Inc., 96 F. (2d) 157, cert. den. 305 U. S. 616 16
Taylor v. *Sternberg*, 293 U. S. 470 19
Thatcher v. *Rockwell*, 105 U. S. 467 12
Yuengling v. *Betz*, 58 App. Div. 8, 68 N. Y. Supp. 574 10

STATUTES CITED.

Judiciary Law of New York, Section 475 ..... 8, 13
Civil Practice Act of New York, Sections 83 and 193(3) 14

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Opinions of the Courts Below.

The opinion of the District Court of the United States for the Southern District of New York is not officially reported. It was written by District Judge John W. Clancy and filed December 6, 1940. The opinion is set forth in full on page 71 of the record.

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 119 F. (2d) 280. The opinion was written by Judge Learned Hand and

filed on April 8, 1941. A copy of the opinion is annexed to the certified transcript of the record and numbered pages 74 to 77.

Jurisdiction.

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered May 23, 1941.

The petition for Writ of Certiorari was filed August 15, 1941. The jurisdiction of this Court is invoked under provisions of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Section 347).

Questions Presented.

In 1934, the Trustee in Bankruptcy secured the consent of the Bankruptcy Court—the Referee—that an action which had been commenced in the Supreme Court of the State of New York prior to the Bankruptcy of the plaintiff in the action, Lyttleton B. P. Gould, should be continued in the State Court by the trustee but in the name of the Bankrupt Plaintiff (Fol. 27). Shortly thereafter the Trustee in Bankruptcy insisted and directed that a motion for the substitution of attorneys for the Plaintiff Bankrupt be brought in the State Court (Fols. 45-47). The State Court granted said motion for substitution of attorneys and fixed the lien of the attorney respondents herein in its Order of Substitution (Fols. 58-63). Pursuant to this Order, all papers and records were delivered by the respondents herein. No appeal was ever taken from said Order of the State Court which was entered February 25, 1935, and the time to appeal has expired.

In 1940, the present proceeding was started when the Trustee in Bankruptcy sought injunctive relief in the Federal District Court in its exercise of ancillary jurisdiction in bankruptcy against the enforcement of your Respondents' lien in the State Court (Fols. 15-33). The case presents the following questions:

1. Whether the Federal District Court in the exercise of ancillary jurisdiction in bankruptcy may enjoin the enforcement of an Order of the State Court which fixed an attorney's lien in an action where the Trustee in Bankruptcy with the consent of the Referee in Bankruptcy has availed himself of the jurisdiction of that State Court in said action?

2. Whether the Order of the Supreme Court of the State of New York from which no appeal was ever taken is not the law of the case?

3. Whether the Trustee, having directed a motion in the New York Supreme Court for a substitution of attorneys and having accepted the benefits of the Order of Substitution and having taken no appeal from said Order within the statutory time allowed, is not now barred on grounds of estoppel, equity and *res adjudicata* from any collateral attack in the Federal Court upon said Order of Substitution?

Statement of the Case.

The petition in this case is for a Writ of Certiorari to review a judgment of the Circuit Court of Appeals for the Second Circuit (R. 74-77), reversing an Order in Bankruptcy entered by the United States District Court for the

Southern District of New York which enjoined David A. Buckley, Jr., and William E. Buckley from taking any steps in an action in the Supreme Court of the State of New York to enforce the charging lien granted by an Order of the State Court.

On May 13, 1941, the Trustee in Bankruptcy applied to the Circuit Court of Appeals for the Second Circuit for a stay of mandate pending the determination of its petition for a Writ of Certiorari. After oral argument and presentation of briefs, the stay was denied.

The cause was remanded to the District Court for entry of an Order denying an injunction. The Mandate was entered on May 23, 1941 (R. 77).

On or about June 4, 1941, the Trustee in Bankruptcy applied to Mr. Justice Stone for a stay of mandate pending the determination of his petition to the Supreme Court of the United States for a Writ of Certiorari. The stay was granted on June 5, 1941.

In 1927, Gould retained Buckley & Buckley, the respondents herein, as his attorneys to sue Murray and Flood in the Supreme Court of the State of New York under an agreement which provided that Buckley & Buckley should act as Counsel for a contingent fee of fifty per cent of the net recovery. Gould at that time was not a bankrupt (Fols. 28, 29, 70, 71).

In 1932, the case came to trial and the plaintiff was nonsuited and appealed (Fol. 29).

The appeal was pending at the time Gould was adjudicated a bankrupt in 1934 by the United States District Court for the District of Connecticut, and Joseph K. Sherman was appointed his Trustee (Fol. 26).

Sherman, the Trustee, agreed and secured the consent of the Bankruptcy Court that the action should be continued in the name of Gould, the Bankrupt (Fol. 27).

In 1934, the Trustee, through his attorney, sought a substitution of attorneys for the Plaintiff Bankrupt and conferred with your Respondents on the matter. Pursuant to this policy Davies, Auerbach & Cornell, the proposed new Counsel, wrote to your Respondents suggesting a stipulation providing for the substitution and the preservation and determination of your Respondents' lien (Fols. 50, 51).

In January, 1935, Davies, Auerbach & Cornell moved in the State Court for their substitution in the place of your Respondents and such a motion was made under the oral and written instructions of the attorney for the Trustee in Bankruptcy (Fols. 45-47).

The State Court entered an Order on February 25, 1935, substituting attorneys and fixing the lien of your Respondents at thirty per cent of any recovery, together with disbursements which should be determined on a reference (Fols. 58-63).

Relying on this Order, your Respondents delivered all papers in their possession, covering more than eight years' work, and the new attorneys prosecuted the appeal and secured a reversal. The Order granting the substitution of attorneys and fixing the attorneys' lien was granted by the Judge before whom the case was tried, the trial of which lasted seven weeks.

Neither the Bankrupt nor the Trustee in Bankruptcy appealed from the Order of the State Court fixing your Respondents' lien (Fols. 208-209) and their time to appeal has expired. Instead the Bankrupt and the Trustee accepted the benefits of said Order, and Davies, Auerbach & Cornell became at that time and have since remained the attorneys of record in said action (Fol. 61).

The action of the State Court came up for a second trial in October, 1940, and the defendants offered to settle for $40,000, which offer was accepted by the Trustee (Fols. 202-210).

Upon the settlement, your Respondents moved in the action in the State Court for an Order directing the defendants to pay to them thirty per cent of the amount agreed upon, together with their expenses (Fols. 141-165).

The Trustee on Oct. 23, 1940 moved in the State Court to vacate the State Court Order of Feb. 25, 1935. This motion was denied May 7, 1941.

The Trustee also on Oct. 23, 1940 applied to the Bankruptcy Court for an Order enjoining your Respondents from prosecuting this motion (Fols. 15-33).

The District Court held that the State Court had no jurisdiction to liquidate the lien and that its Order was a "nullity" and enjoined the Respondents from proceeding in the State Court (Fols. 211-213). On December 20, 1940, an Order was entered in the United States District Court for the Southern District of New York enjoining and restraining Respondents from taking any further proceedings to collect upon their attorneys' lien in the State Courts (Fols. 10 to 14).

Your Respondents appealed from this Order of the District Court and the Circuit Court of Appeals for the Second Circuit reversed the Order of the District Court and denied the motion for an injunction (R. 74-77).

The Opinion of the Circuit Court is reported in 119 F. (2d) 280.

ARGUMENT.

The decision of the Circuit Court of Appeals in the instant case is not in conflict with any decision of any other Circuit Court of Appeals or of any Court of the State of New York or of the Supreme Court of the United States.

The New York Supreme Court had jurisdiction to determine the attorneys' lien and is the proper Court to enforce it. The Trustee in the performance of his duties elected to continue the action in the State Court and utilized the procedure thereof to obtain a substitution of attorneys for the formal plaintiff and, by so doing, the Trustee subjected himself to the jurisdiction of the State Court for the determination of the lien of Buckley & Buckley. Having taken no appeal from the Order fixing the lien, the Order is now a final determination and cannot be attacked collaterally.

The decision of the Court below is correct and presents no question of law calling for review by this Court.

I.

There is no conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the instant case and the decision of the Circuit Court of Appeals for the Eighth Circuit in *McDaniel National Bank* v. *Bridwell*, 65 F. (2d) 428.

The petitioner has set forth an incomplete statement of the *McDaniel* case in his brief at pages 20 to 22. He has failed to point out that the plenary suit brought by the Trustee in an Equity Court, to which the bank was a party, to determine the ownership of a bank deposit was finally determined by that Court; that the bank asserted no claim to the deposit; and that no appeal was ever taken by any party. It was subsequent to such final determination that the Bank filed a new Bill in Equity requesting the payment of a promissory note out of the deposit which was the subject of the prior suit.

In the *McDaniel* case the trustee originally sought the jurisdiction of the Equity Court, but the Bank did not then take advantage of the presence of the trustee in the Equity Court, but permitted a final determination of that action. Thereafter, when the trustee was no longer subject to the jurisdiction and the power of the Equity Court, the Bank sought by a separate suit to recover on a promissory note of the Bankrupt. At page 429 the Court said:

> "The subject-matter of the suit of the trustee was the ownership of the deposit. The claim which the bank now seeks to offset is upon the note of the bankrupt. This note did not arise out of the same transaction as the deposit. The bank elected not to assert its right of set-off against the trustee in the original suit. It permitted that suit to be finally determined."

It is of interest to note that, as an incident to the original suit in determining the amount to be turned over to the Trustee, the Equity Court instructed that an attorney's fee be allowed Counsel for the Bank and that such attorney's fee and costs should be deducted from the amount to be paid over to the Trustee.

In the instant case the attorney's lien attached to the cause of action as soon as the action was commenced (See New York Judiciary Law, Sec. 475, which is set forth in Appendix, p. 23). In the substitution of attorneys after bankruptcy it was proper for the court to fix the lien of the substituted attorneys. The substitution was an outgrowth of the prosecution of the cause of action by the trustee in the name of the formal plaintiff. The enforcement of the lien is, therefore, not independent of the cause of action which the bankrupt with the consent and approval of the referee and of the Trustee in Bankruptcy prosecuted in the New York Supreme Court.

Rather than there being a conflict of decisions in the several Circuits, a study of the reports discloses that the decision in the instant case by the Circuit Court of Appeals is in accord with analogous decisions elsewhere. For example, in the Fifth Circuit, in the case of *Brown Shoe Co.* v. *Wynne,* 281 Fed. 807, it has been held that a judgment of a state court, subjecting to a lien property over which it acquired jurisdiction prior to bankruptcy proceedings against the defendants is conclusive on them and their trustee in bankruptcy, and not subject to review or annulment by the bankruptcy court.

II.

The Circuit Court of Appeals for the Second Circuit in the instant case has not decided a question of local law in conflict with New York decisions.

Petitioner at page 9 of his petition states that the Circuit Court decided that "new attorneys could not be substituted in the State court action without the consent of that court . . .". This reference by the petitioner to the opinion of the Circuit Court of Appeals lifts out a single sentence of the opinion and does not represent the exact thought of the court. The relevant portions of the opinion of the Circuit Court of Appeals on this matter of substitution are as follows:

> ". . . He could of course substitute other attorneys, as he did, and Buckley & Buckley were obliged to retire; but the substitution did not affect their charging lien under § 475 of the Judiciary Law of New York, or their possessory lien upon the papers. The concluding clause of § 475 gives power to the state court to 'determine and enforce the lien,'

> which the 56th Rule of the Supreme Court has declared must be 'on such terms as shall be just.'
>
> ". . . He could not insist that new attorneys should represent him in that court without its consent, upon which it might impose such conditions as it saw fit. . . . As we have said, the trustee got the permission of the bankruptcy court to allow the action to be prosecuted in the state court. That necessarily involved a consent to such incidents as the exercise of that court's jurisdiction might involve, among them that, as a condition upon the substitution of new attorneys, the charging lien of the displaced attorneys must be liquidated."

In the first place, the Circuit Court has correctly stated the New York rule. It is well settled in New York that the courts have power to make an order of substitution upon the condition that the plaintiff shall pay the amount then due to the attorney of record, and to send the matter to a referee to determine the amount then due.

Kane v. *Rose,* 87 App. Div. 101, 84 N. Y. Supp. 111, aff'd 177 N. Y. 557, 69 N. E. 1125;

Yuengling v. *Betz,* 58 App. Div. 8, 68 N. Y. Supp. 574;

Bernstein v. *Bedrick,* 262 N. Y. 472, 188 N. E. 25;

Hofman v. *New York & Queens Electric Light & Power Co.,* 247 App. Div. 819, 286 N. Y. Supp. 685, modified 247 App. Div. 890, 288 N. Y. Supp. 768;

McNally v. *Youngs,* 237 App. Div. 787, 262 N. Y. Supp. 828, appeal dismissed 262 N. Y. 526, 188 N. E. 49;

Lawbaugh v. *Sweeney,* 237 App. Div. 788, 262 N. Y. Supp. 830 appeal dismissed 262 N. Y. 528, 188 N. E. 50;

Hausvater v. *Wikler & Diamont, Inc.*, 154 Misc. 555, 277 N. Y. Supp. 810;
Matter of Tillman, 259 N. Y. 133, 181 N. E. 75.

Moreover, on February 25, 1935, Mr. Justice Edward J. McGoldrick entered an order substituting the firm of Davies, Auerbach & Cornell for the firm of Buckley & Buckley as attorneys for the Bankrupt and further ordered that the firm of Buckley & Buckley be awarded a lien of 30% upon any moneys recovered (Fols. 58-63). If petitioner wished to contest the order as being contrary to the New York rule, then he should have caused an appeal to be taken through the proper channels.

The Trustee did move to vacate the Order of the New York Supreme Court fixing the lien on October 23, 1940 (Fols. 118 to 140). The time to appeal from such Order had long since lapsed. The Trustee's motion was denied by the New York Supreme Court. The Order stands therefore as the Law of the Case.

Hobbs vs. *Head and Dawst Co.* 231 U. S. 692;
In re American Fidelity Corp., Ltd. 28 F. Supp. 462.

III.

The New York Supreme Court had jurisdiction to fix the amount of the attorneys' lien of Buckley & Buckley and is the proper court to enforce that lien.

Petitioner's "Reasons" for granting the writ numbered III, IV and V, are dealt with under this point and are grouped together because it is felt that the repetition and generalities of principles of law, set forth in the petition,

do not clearly and specifically deal with the factual situation in the instant case, such as the failure of the Trustee to act under the procedure available to him when first appointed, his subsequent consent to the jurisdiction of the State Court, and his acquiescence in and acknowledgment of the receipt of benefits from the Order of the State Court, all of which is now ignored by the Trustee.

The instant case does not involve a novel question of law for decision by the Supreme Court of the United States, but is based upon existing facts which have been determined by the Circuit Court of Appeals for the Second Circuit and in accordance with sound precedents after oral argument by the present counsel for the petitioner and the respondent.

It would appear that the "Reasons" numbered III, IV and V of the petition depend upon these questions: (1) Did the New York Supreme Court have jurisdiction to fix the lien; (2) Is it the proper court to enforce that lien? The decisions of the Supreme Court of the United States, and other courts, are clear in showing that the above questions should be answered in the affirmative.

A. The New York Supreme Court had jurisdiction to fix the attorneys' lien of Buckley & Buckley.

An action pending in a state court will not abate because of the bankruptcy of the plaintiff and the State Court continues to have jurisdiction.

Eyster vs. *Gaff*, 91 U. S. 521;
Thatcher vs. *Rockwell*, 105 U. S. 467;
Connell vs. *Walker*, 291 U. S. 1.

That a Court having jurisdiction of a cause of action and the parties thereto has the power and authority to conduct, adjudicate and control every incident thereto is

well settled. The procedure and orders affecting the rights of litigants and officers of the Court to an action are all incidents of which the Court first acquiring jurisdiction should control. One of the best quotations authoritative of this statement is found in the case of *Peck* v. *Jenness*, 7 How. 612, wherein the Court said at pages 624 and 625:

> "It is a doctrine of law too long established to require a citation of authorities, that, where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity."

These principles of *Peck* v. *Jenness, supra*, have been followed:

Metcalf v. *Barker*, 187 U. S. 165;
Pickens v. *Roy*, 187 U. S. 177;
Hunt v. *New York Cotton Exchange*, 205 U. S. 322, 339;
Palmer v. *Texas*, 212 U. S. 118, 129.

From the commencement of the action in 1927 by Gould against Murray and Flood, a lien attached to the avails thereof for the firm of Buckley & Buckley (New York Judiciary Law, Section 475, *supra*, p. 23). This lien was an incident of the main cause of action and was dependent upon it. This lien was a substantive right and could not be prejudiced by the substitution of attorneys.

In Re Baxter & Co., 154 Fed. 22, 25.

When the Trustee directed the motion in the State Court to substitute attorneys, he thereby initiated the procedure in the state court of which the fixing of the lien was a part. He took advantage of Sec. 83 of the New York Civil Practice Act (Appendix, p. 23) by reason of which the action by Gould, the Bankrupt, against Murray and Flood could be continued in the name of the original party, Gould, after the bankruptcy. He could have intervened and appealed, being the real party in interest, but failed to do so. Sec. 193, sub. 3 of the New York Civil Practice Act (Appendix, p. 23). In his opinion below, Judge Learned Hand said:

> "* * * When he determined to do that, he necessarily subjected himself to the procedure of the state court, of which the substitution of attorneys was a part. He could not insist that new attorneys should represent him in that court without its consent, upon which it might impose such conditions as it saw fit. In spite of the fact that the jurisdiction of the bankruptcy court is usually described as 'exclusive', it may consent to have the interests of third persons in property of which the bankrupt had possession, adjudicated in a state court if that is more convenient. Foust *v.* Munson S. S. Lines, 299 U. S. 77; Texas *v.* Donoghue, 302 U. S. 284; Thompson *v.* Magnolia Petroleum Co., 309 U. S. 478, 483; In Re Schulte United, Inc., 49 Fed. (2) 264 (C. C. A. 3). As we have said, the trustee got the permission of the bankruptcy court to allow the action to be prosecuted in the state court. That necessarily involved a (fol. 78) consent to such incidents as the exercise of that court's jurisdiction might involve, among them that, as a condition upon the substitution of new attorneys, the charging lien of the displaced attorneys must be liquidated" (R. pp. 76, 77).

In the case of *Kane* v. *Rose*, 87 App. Div. 101, 84 N. Y. Supp. 111, aff'd 177 N. Y. 557, 69 N. E. 1125, the Appellate Division said at page 103:

"* * * The plaintiffs accepted the order of substitution containing the provision for the reference, and that order not having been appealed from must be binding upon the parties in all of its terms and conditions. Section 66 of the Code of Civil Procedure provides that the 'court upon the petition of the client or attorney may determine and enforce the lien,' and the plaintiffs having invoked the equitable powers of the court in making a change of attorneys (Greenfield *v.* Mayor, 28 Hun, 320, 321) they must be deemed to have submitted to the jurisdiction (Yuengling *v.* Betz, 58 App. Div. 8, 10) and they are bound to submit to any lawful order of the court."

Petitioner has made frequent references to the so-called exclusive jurisdiction of the bankruptcy court, but at page 50 of his brief has recognized that it is proper for a bankruptcy court to permit a State Court to try a certain issue when such bankruptcy court feels that the State Court is in a better position to determine the same expeditiously. That the jurisdiction of the bankruptcy court is not exclusive and that the State Court is the proper tribunal to settle certain matters has been recognized by this and other Federal Courts.

McHenry v. *La Societe Francaise*, 95 U. S. 58;
Corner v. *The John Hancock Life Ins. Co.*, (C. C. A. 8th) 80 F. (2d) 413;
In re Devereaux, 76 F. (2d) 522;
Matter of American Fidelity Corp., Ltd., (S. D. Cal.) 28 F. Supp. 462.

B—The New York Supreme Court is the proper court to enforce the lien.

The attorneys' lien of the firm of Buckley & Buckley is a statutory lien, came into being in 1927 with the filing of

the complaint and its status was not impaired by the bankruptcy of the plaintiff.

In re Prudence Co., Inc., 96 Fed. (2d) 157, certiorari denied 305 U. S. 616;
Hartman v. *Swiger*, 215 Fed. 986;
In Re Pennell, 159 Fed. 500;
In re Baxter, 154 Fed. 22;
Oishei v. *Pennsylvania R. R. Co.*, 117 App. Div. 110.

The New York Supreme Court had jurisdiction of the subject matter and the parties when it fixed the lien of 30% (See A, *supra*). Mr. Justice McGoldrick acted in accordance with the New York decisions when he awarded the firm of Buckley & Buckley a lien of 30% upon any moneys recovered through the action (*supra*, Point II).

Moreover, the Trustee, having accepted the benefit of the Order, should not now be permitted to question either the validity of the Order or its enforcement.

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

Davis v. *Wakelee*, 156 U. S. 680, 689.

To refuse to enforce the order, would deprive the firm of Buckley & Buckley of a substantive right established by virtue of Section 475 of the Judiciary Law.

In re Baxter & Co., 154 Fed. 22.
Bernstein v. *Bedrick*, 262 N. Y. 472, 188 N. E. 25.

The State Court did not cause a conflict with nor impair the jurisdiction of the bankruptcy or the administration of the bankrupt estate, for by its order it made possible the decision of the Trustee to secure new counsel while retaining the benefit of eight years' work of former counsel. The State Court Order forced the surrender of valuable property and fixed the compensation. This compensation was known and acceptable to the Trustee since 1935 and was payable out of the proceeds of the action. This could not have interfered with but only aided the administration of the bankrupt estate. The State Court had before it the cause of action, the attorneys involved as its officers whom it could direct and discipline if necessary and whose services it knew, and therefore, it is submitted, is the Court best suited and with proper jurisdiction over all necessary parties to enforce the lien.

The Supreme Court of the United States has decided that if the Trustee intervenes in the State Court to contest a lien rather than have its validity decided by a summary proceeding in the Bankruptcy Court, the Trustee is bound by any decision handed down in the State Court.

> *Connell* v. *Walker*, 291 U. S. 1;
> *Fischer* v. *Pauline Oil & Gas Co.*, 309 U. S. 294;
> *Hobbs* v. *Head, etc., Co.*, 231 U. S. 692.

In the well considered opinion in the case of *In Re American Fidelity Corp., Ltd.*, (S. D. Cal. 1939) 28 F. Supp. 462, the court had to deal with a situation in which a trustee in bankruptcy had submitted to the jurisdiction of the state court to determine the validity of an execution lien. The state court upheld the validity thereof, and on the finality of that decision, the District Court, at page 471, held as follows:

> "In any event, a federal court has no power to interfere with a state court judgment, even though void on its face, unless the federal court otherwise has jurisdiction over the parties just as though there had been no bankruptcy proceedings. In such circumstances it is necessary that a complaint be filed in the nature of a bill to review the judgment upon the ground of fraud, accident, surprise, mistake, or the like. Le Messager v. Variel, *supra.* The proceeding now before this court is not of such nature. There having been no appeal and no properly grounded suit collaterally attacking the validity of the judgment of the state court, that judgment is now a final determination by a court of competent jurisdiction."

The Trustee is attempting to establish that he is entitled to an adjudication by two separate courts, one state and one federal, on the validity of the lien. He submitted to the state court in 1935, accepted its order without appeal and, now being dissatisfied with the order therein, asks the bankruptcy court to invalidate that order. Such a position was held untenable by this Court in the recent case of *Arkansas Corporation Commission* v. *Thompson,*————————U. S. ————————, 85 L. Ed. 801, decided April 28, 1941, wherein it was held that a determination of value for state taxing purposes made by a properly constituted Arkansas Commission, from which no appeal was taken by the Trustee in bankruptcy, was final and could not be upset by the bankruptcy court on petition of the Trustee.

C—The Decisions of the Supreme Court in *Isaacs* v. *Hobbs Tie & Lumber Co., Taylor* v. *Sternberg* and *Gross* v. *Irving Trust Co.,* Are Not in Conflict with the Decision of the Circuit Court of Appeals in the Instant case.

In *Isaacs* v. *Hobbs Tie & Lumber Co.,* 282 U. S. 734 there was a question of real estate. The title to the real estate

was in the Trustee in Bankruptcy. The proceeding to foreclose the mortgage was commenced after the petition in bankruptcy, and at a time when the proceedings in bankruptcy had progressed as far as an order authorizing the sale of the property in question. In our present case the Supreme Court of the State of New York had jurisdiction for more than seven years prior to Bankruptcy and retained its jurisdiction of the cause of action and proceeded with its conduct not in conflict with, but in assistance of the Bankruptcy Court in keeping with the Trustee's desires.

In *Taylor* v. *Sternberg,* 293 U. S. 470, there was a state's receivership and within one month there was an adjudication in bankruptcy. The state receiver, after the adjudication, turned over to the Trustee in Bankruptcy the property less his own compensation and the compensation of his attorney. In that case the property of the Bankrupt during the state receivership was in the possession of the state court in fact and upon bankruptcy the possession of the Bankruptcy Court attached. This ended the jurisdiction of the state court, under the well-settled principles of Bankruptcy Law. The state court's subsequent act in fixing the receiver's compensation was in conflict with the Bankruptcy Court and without jurisdiction. However, in the instant case, the jurisdiction of the state court continued.

A somewhat similar case was *Gross* v. *Irving Trust Company,* 289 U. S. 342, where again we have a state receivership and bankruptcy within four months and the state court fixing the compensation of the receivers and their counsel after bankruptcy. In that case the state receivership occurred on October 13, 1931, Federal bankruptcy on October 14, 1931 and on December 14, 1931 the state court made allowance to its receivers and their

counsel. Again there was no question of the fact that the jurisdiction of the state court terminated upon bankruptcy and there was a conflict with the Bankruptcy Court.

In all of these cases we find a situation in which no attorney's lien is discussed nor arises as an issue, nor is there a continuing jurisdiction in the state courts such as in our case. The rules of bankruptcy were created to safeguard and protect the bankrupt estate and thus the creditors of the Bankrupt. At the same time these rules were not created to destroy or wipe out the principles of comity, and legally existing substantive rights of attorneys under state laws. Bankruptcy did not wipe out the state law and the federal law in respect to an attorney's lien, which, because of its peculiar nature, is attached to and becomes part of the action in question and to which the Trustee in Bankruptcy was subordinated in that he could enjoy and take the proceeds of the action, subject only to the charging lien of the attorneys. It is not sufficient to merely offer in prayer the word "bankruptcy" and cite some cases involving it, which upon scrutiny and careful analysis have no application whatever to our present facts.

IV.

This case does not present a novel question.

The petitioner would present for consideration what is purported to be a novel question, a solution of which is essential to the orderly administration in bankruptcy courts. In submitting such a question and his suggestion to this Court that he presents a grave question of public policy which would require the attention and decision of this Court, petitioner fails to point out that there were sev-

eral methods of procedure available to the petitioner in 1935 in respect to the State Court action. He did not avail himself of the other methods of procedure under the Bankruptcy Act, but voluntarily elected the proceedings in the instant case. He requested assistance of the State Court and this assistance was rendered and given to him. His procedure was based on established law. Under these circumstances, it is difficult to consider as serious the petitioner's suggestion that we have novel questions of law involved in the instant case.

The relationship of an attorney's lien on an action in a state court to bankruptcy proceedings was passed upon in *In re Adamo,* 151 Fed. 716 (1907), wherein it was held that a trustee is not authorized to compromise and settle a suit brought by the Bankrupt in a state court without the consent of the Bankrupt's attorney in such suit who has a lien on any judgment recovered for his services.

This was a case in the Eastern District of New York which has never been reversed and was available to the petitioner for his consideration when he chose his path of procedure in 1935.

The position taken by the petitioner is contra to established practice for the orderly administration of bankrupt estates. If the Order herein questioned were invalidated, then there was no proper substitution of attorneys; the entire proceedings in the State Court would fall; the settlement of the action in the State Court was improper; the defendants in the State Court action are not protected; your respondents will be deprived of their property under the lien and all parties would ultimately be litigants with and against each other and with and against the Bankrupt's estate.

Conclusion.

The decision below is correct. No question of importance is involved and no conflict exists. We therefore respectfully submit that the petition should be denied.

Respectfully submitted,

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